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Anticompetitive impact of Star Pagination license fee provisions creates temporary delay for Thomson-West merger

by Catherine Moore

The Justice Department recently approved the merger of the largest and the third largest publisher of law books and legal materials in the United States. Notwithstanding the Antitrust Division of the United States Justice Department and seven states working to prevent Thomson Corporation ("Thomson") from acquiring West Publishing Company ("West") by filing suit under Section 7 of the Clayton Act, 15 U.S.C. § 18, no antitrust issue could keep the two corporate powers from joining.

In *United States v. Thomson Corp. and West Publishing*, 949 F. Supp. 907 (D.C.Cir. 1996), the District Court for the District of Columbia determined that the parties' proposed final judgment ("PFJ") served the public interest under the Tunney Act with the exception of one provision. The court held that licensing fee provisions for star pagination creates a barrier to entry into the legal source markets. The court stated that the proposed final judgment would be in the public interest if the fee provision were eliminated.

Consolidation of major publishing companies reduces competition in legal service markets

The Government alleged that the acquisition of West by Thomson

would result in reduced competition in three legal source markets: enhanced primary law products, secondary law products, and online legal research services. West and Thomson are direct competitors in the primary and secondary markets. West and Thomson are not direct competitors in the online research market, but Thomson provides some primary and secondary law products to Lexis-Nexis ("Lexis"), West's only competitor in the legal source market.

The Government contended that the consolidation of Thomson and West would reduce competition in the primary and secondary law products markets. First, the Government alleged that competition would be substantially reduced in the enhanced primary law products market because West and Thomson are the only publishers of nine case law reporters. The Government emphasized that the acquisition would create barriers to entry for potential competitors. According to the Government, the acquisition would give Thomson control over the resources necessary to publish legal source products and, therefore, the ability to exclude smaller competitors from the market and narrow competition. The Government also argued that the consolidation of Thomson and West, two major market participants in the

secondary law products market, would result in higher prices, lower quality, and stagnated innovation.

The Government further alleged that competition in the online legal research services would be restricted by the merger. West owns Westlaw, an online legal research service that is a direct competitor of Lexis. Lexis licenses Auto-Cite and some nonlegal databases from Thomson. The Government alleged that if Thomson acquired West, the resultant merged company would lose its incentive to provide Lexis with its accompanying products at the same quality and price levels as it provided in the past and that competition in the online legal research services market would deteriorate.

The Government contended that the merger would adversely affect all three legal research markets because of West's star pagination copyright. Star pagination is a system that inserts West reporter page numbers and breaks into published judicial decisions. West's National Reporter System has such widespread use in the legal community that people often expect and sometimes require citations to West. In the past, West licensed star pagination to Lexis but maintained its copyright claim against all other competitors. The complaint alleged that other companies would be

unable to compete in any one of the three legal research markets without access to star pagination and that the threat of copyright litigation would keep rival companies out of the market.

Proposed final judgment: Provisions and procedural requirements

The Government initially filed a complaint accompanied by a proposed final judgment. The PFJ delineated certain conditions that Thomson would have to meet in order to receive authorization to acquire West. Under the PFJ, Thomson would be required to (1) divest itself of some of its assets; (2) license star pagination; (3) grant some of its licensees the option to extend their licenses; and (4) give certain states the choice of maintaining or terminating their contracts with West or Thomson. West and Thomson consented to the PFJ, asserting that the PFJ would sufficiently reduce any anticompetitive effects of the merger.

Before the district court could determine whether the PFJ was in the public interest under the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16 (the "Tunney Act"), the Government needed to comply with certain procedural requirements (e.g., notifying the public of the provisions in the PFJ and allowing time for outside parties to comment on the merger).

Several commentators moved to intervene or to participate as *amicus curiae* in the suit. The court denied these motions to all of the parties except for competitors Lexis and Hyper Law, Inc. The court permitted

both companies to participate as *amicus curiae* and to participate in the Tunney Act hearing.

The court held a one day hearing. Following this hearing, the Government filed a motion for entry of a revised PFJ.

District court assigned passive role in making public interest inquiry

The district court began its discussion of the Tunney Act proceeding by addressing its role in making the "public interest" inquiry. The Tunney Act mandates that courts consider the impact that a PFJ places on competition and third party interests. However, prior to the instant case, the District of Columbia Circuit has added to the considerations and has also limited its reviewing power in Tunney Act matters. For example, the District of Columbia Circuit has held that the court should additionally consider the clarity of the consent decree, the ease with which the parties can comply with its provisions, and the likelihood of future monopolization. In *United States v. Microsoft Corp.*, 56 F.3d 1448 (D.C.C. 1995), the District of Columbia Circuit Court held that the court is required to contain its inquiry within the scope of the claims brought by the Government and that a district court should defer to the assessments and predictions of the Government.

Commentators challenge sufficiency of divestiture requirements

The PFJ primarily recommended the divestment of certain Thomson publications to counteract the

anticompetitive affects of the merger with West. However, some commentators expressed concern that the divested products would become isolated from the Thomson network and would not remain viable.

The court found that the Government's proposal sufficiently addressed this concern. The court noted that buyers who acquired Thomson products would receive all production assets of the divested products, would be provided with transition production by Thomson, and would not be restricted from offering employment to Thomson/West production employees. The court further noted that the divestitures were subject to the Government's approval. The court concluded that these provisions reasonably assured that the divested products would be purchased by capable buyers who would receive substantial assistance in maintaining the products' viability.

Another group of commentators argued that the secondary law products market would not remain competitive unless entire Thomson subsidiary companies were further divested. This claim was partly based on the theory that West's and Thomson's cross-referencing systems are interdependent, the economies of scale involved, and the significance of West's and Thomson's brand-names. In response to these arguments, the Government found that cross-referenced individual Thomson products could be effectively maintained by outside companies. The Government also found that the PFJ required Thomson to divest products that did not require the Thomson brand-name to remain viable. Although the Government

did not offer much support for these findings, the court deferred to the Government and determined that the findings were reasonable.

The subsidiary divestment argument was mainly based on the assertion that Thomson would either prohibit acquirers of divested products to cross-reference Thomson products or would charge acquirers for cross-references. The defendants denied this assertion and maintained that it would continue to allow citation of its products after the merger. Since the parties revised the consent decree after the initial hearing to include a provision that stated that Thomson would not prohibit cross-references to either its libraries or Auto-Cite, the court concluded that Thomson would not be able to use cross-references to hinder the viability of divested products.

Some commentators also wanted either Thomson to divest American Jurisprudence (Amjur) or West to divest Corpus Juris Secundum (CJS), arguing that the merger would eliminate competition between the two products. Due to the significant differences in the product market between the two products, the court held that the Government reasonably concluded that the merger would not have an anticompetitive effect in this area. The court further stated that this matter was beyond the scope of the Tunney Act proceeding because the Government did not include this issue in its complaint.

The court concluded that the PFJ sufficiently addressed the viability of the divested products and the maintenance of competition in the related markets and that further divestiture of products or subsidiar-

ies was unnecessary. In making this conclusion, the judiciary relied on the Government's factual, predictive findings and recognized the court's inability to "second-guess" the findings.

Effectiveness of official reporter contract options questioned

The purpose of the release options granted to those states holding Thomson Official Reporter contracts was to give those states the ability to choose whether their official reporters should be published by a company other than Thomson/West. However, many commentators remained concerned the release options would not sufficiently alleviate the anticompetitive impact of the merger in primary source markets.

The Government concluded that a significant incentive existed for companies that bid for official reporter contracts in other states to enter, for example, the Wisconsin market, and that these companies were sufficiently competitive to bid against Thomson/West. Furthermore, the State of Wisconsin supported this arrangement, and the court held that this arrangement served the public interest. Lastly, the court determined that the merger would not lessen competition in other states (e.g., Illinois, New York, or Massachusetts).

Full "TCSL" divestiture sought in place of specific product license extensions

In anticipation of the merger, Thomson agreed to extend the terms of the most important licenses held

by Lexis. Thomson extended most of the terms of these licenses by five years at premerger prices, making the average length of the licenses seven years.

The Government's PFJ negotiations with Thomson resulted in two additional measures for protecting Lexis's interests. The first measure required Thomson to extend the licenses for the nonlegal databases—which Lexis considered to be the most important—by five additional years. The second measure required Thomson to divest itself of Auto-Cite. The Government determined that these two provisions, along with the license extensions negotiated between Thomson and Lexis, and any market adjustments, were sufficient to ensure that Lexis would retain its competitive edge and protect competition in the online legal research services market.

Lexis argued that Thomson would have to divest its Total Client Service Library ("TCSL") in order for it to remain competitive in the online market Lexis claimed that the Thomson/West alliance threatened its ability to obtain licenses for four "essential" TCSL services: (1) the annotations in ALR; (2) the annotations in Lawyers' Edition; (3) the Amjur Encyclopedia; and (4) Auto-Cite.

The Government concluded that the PFJ sufficiently protected Lexis's concern and that complete divestiture of the TCSL was unnecessary. The Government determined that Lexis could continue its access to Auto-Cite and Lawyer's Edition because the PFJ provided for the divestiture and future licensing of these products. The Government further determined that the divestiture of either Amjur

or ALR was not necessary to facilitate competition because Lexis had only recently licensed Amjur and because ALR annotations were not significant substitutes for West annotations.

In addition, the Government found that the Amjur and ALR license extensions provided Lexis sufficient time to create replacements for these products. The court reviewed the Government's findings and supported them as reasonable. Thus, the court held that the consent decree was in the public interest despite arguments from Lexis that these measures were not sufficient.

Auto-Cite divestiture challenged

Auto-Cite is an online system that provides full case law citations, case histories, and cross-references to products (such as ALR). The Government required Thomson to divest this service, recognizing that Lexis needed Auto-Cite to compete effectively with Westlaw after the merger. The Government further required Thomson to divest "all the means necessary" for an acquirer to provide Lexis with Auto-Cite without assistance from Thomson/West. To ensure that Auto-Cite would remain a quality product in the future, the Government also required that the acquirer have the intent and ability to operate the service as a viable and competitive product.

Lexis, however, maintained that the PFJ did not provide for the complete divestment of Auto-Cite because the PFJ permitted Thomson to retain key elements of the

product. Lexis argued that it would be unable to effectively compete with Westlaw unless Thomson divested "all rights and interests" in Auto-Cite.

The court concluded that Lexis was most concerned with Thomson's right to retain a copy of the Auto-Cite database. Lexis expressed concern that the PFJ did not require Thomson to divest its right to sublicense the Auto-Cite database. Both the Government and Thomson and West maintained that the acquirer would be able to sublicense Auto-Cite; therefore, they revised the PFJ to specifically state that the acquirer would control the right to sublet the Auto-Cite database.

Lexis also expressed concern that Thomson should be required to divest ALR as part of the Auto-Cite divestiture. However, the court ruled that because cross-references to ALR do not add significant value to Auto-Cite, divestiture of ALR is not necessary.

Lexis's Auto-Cite License Agreement with Thomson requires that Thomson include all related Auto-Cite assets if it assigns the license to another party. Lexis argued that the proposed consent decree "effectuated a taking of its property without due compensation under the Fifth Amendment" because it did not contain this requirement. The court determined that the consent decree and the license agreement were separate matters and that one did not prevent compliance with the other. The court found that because the consent decree did not prevent Thomson from fulfilling its obligations under

the License Agreement, the PFJ did not violate the Fifth Amendment.

Star Pagination license fee provisions rejected as against public interest

The Government claimed that although West's copyright claim to star pagination threatened to impose a significant barrier to entry into all three legal research markets, the provision added to the PFJ requiring Thomson license star pagination without restriction alleviated the threat. Lexis and many of the commentators argued that the anticompetitive effects of the star pagination copyright were so significant that West should be required to abandon the star pagination altogether.

In considering this argument, the court reviewed the history of West's copyright and previous lawsuits which resulted in varying holdings as to the legitimacy of the claim. To support its position, the court looked to a recent decision concerning a similar copyright. In *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1990), the Supreme Court held that "selection, coordination and arrangement" of information is not a legitimate copyright claim unless "sufficiently original to merit protection." The district court concluded that, in light of the *Feist* decision, West would have to show that star pagination was an original way of organizing data. The court indicated this requirement rendered West's claim "thin."

Thomson and West countered by arguing that the validity of the star

pagination copyright was not within the scope of the district court's reviewing power for the purposes of the Tunney Act proceeding. Thomson and West based their argument on contentions that the copyright claim did not constitute a Clayton Act violation and that it was unrelated to the merger.

The court dismissed Thomson and West's copyright argument and established its power to review the star pagination license. The court stated that the Government's repeated concerns regarding star pagination in the complaint established that star pagination was related to the merger and that it possibly constituted a Clayton Act violation. The court also stated that the license was the product of the parties and, as such, was subject to the court's review.

The court found that the PFJ did not adequately reduce the anticompetitive impact of the star pagination copyright claim. Although West agreed to grant licenses without restriction and agreed to allow the licensees to retain the ability to challenge the copyright, the court held that the control of the copyright, especially by such a large firm, would result in a substantial barrier to entry into all three legal service markets.

The Government argued that the license was not against public policy for the purposes of the hearing because it actually reduced the barriers to entry. Moreover, consumers continued to have the option of using star pagination without a license or of challenging the validity of the claim through lawsuit; also, consumers now had the option of

licensing it at rates less than what Thomson previously charged Lexis.

The court stated that in light of the weakness of West's claim, the rates were not reasonable. The court found that the cost of either litigating the validity of the copyright claim or paying the fee provisions could easily exclude smaller companies from the legal source markets.

Most importantly, the court reasoned that upholding the fee provision would effectively lend its "judicial imprimatur" to a copyright claim which it believed to be dubious. The court proved reluctant to support the copyright claim, indicating that it would place the burden and expense of litigating the claim on the parties the court believed to have the strongest legal argument. The court determined that if West wanted to maintain its copyright, West should have to initiate and finance the litigation.

The court concluded that the strength of the arguments presented by third parties outweighed the deference due to the Government for the fee provision. Since the court could not hold that the fee provisions served the public interest, the court could likewise not hold that the PFJ was in the public interest. However, the court suggested that an appropriate remedy would be to grant the licenses for free. Free licenses and no litigation costs would significantly reduce barriers to entry such that the dubious nature of the copyright claim would not prevent the court from holding the PFJ to be in the public interest.

Other commentators expressed concerns about the star pagination

copyright claim. Some argued that the star pagination license required licensees to disclose sensitive competitive information to Thomson/West and that this should not be required. However, the court explained that a short description of a product or service, which is all that is required, was not sensitive information. Other commentators requested that third parties who had obtained texts with star pagination be permitted to resell or transfer the texts. The court ruled that the PFJ permitted such transfers, provided that the transferee held a star pagination license.

Conclusion

The district court's passive role in the Tunney Act proceeding restricted its ability to question the Government's findings on factual issues. However, the dubious nature of West's star pagination copyright claim combined with the significant barriers to entry created by the fee provisions so substantially affected third party interests that the court determined, in part, the Government's findings to be erroneous. The court ruled that the fee provisions did have an anticompetitive impact on the three legal service markets; as a result, the PFJ was not entirely in the public interest under the Tunney Act. Although the court struck down the PFJ in whole, it stated that the PFJ would receive its "stamp of approval" once the fee provision for the star pagination license was eliminated.